DANIEL D. WILLIAM

v.

LUHAT WAN & ORS. & ANOTHER CASE (1)

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NOS. P1433 OF 1985 & A 24 OF 1985]
19 DECEMBER 1985

CIVIL PROCEDURE: *Application for leave to adduce further evidence - Application made after close of case and at the end of a trial pending judgment - Principles governing adducing of fresh or additional evidence after close of a case.*

This was an application by the first defendant for leave to adduce further evidence to meet the contention raised by the plaintiffs Counsel that the sale of the social welfare lottery tickets was illegal as the seller was not an authorised seller pursuant to s. 9(1)(b) of the Social Welfare Services Lotteries Board Act 1952-1962. The grounds of the application were that the issue of illegality was raised only after the close of the defence and during submissions stage of the trial thereby giving the first defendant no opportunity to rebut the allegation of illegality and that the evidence which was sought to be adduced would have an important influence on the outcome of the case and also the evidence is said to be credited. The learned Judge noted that the first defendant was cross examined by Counsel for the plaintiff regarding the seller's (DW2) authority to sell social welfare lottery tickets. The seller himself (DW2) was also cross examined on his authority to sell the tickets. Further, the pleadings also showed that the issue of illegality of the transaction would be advanced. Further the purported written authority which was sought to be adduced showed that DW2 was only authorised to sell lottery tickets in the State of Pahang.

Held:

[1] Under certain conditions further and or additional evidence may be adduced at the hearing in the first instance, even though the side seeking to adduce evidence had closed its case.

[2] The conditions which must be fulfilled in order to adduce new evidence are; that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly, the evidence must be such that if given, it would probably have an important influence on the outcome of the case, though it need not be decisive, thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be credible, although it need not be incontrovertible.

[3] On the facts of this case, the first defendant was put on notice that the issue of illegality was going to be advanced and steps should have been taken to find out if the seller was authorised to sell the tickets. Further the purported written authority did not carry the matter further and it is just as good or bad as if he had no authority. Accordingly, the first defendant had not fulfilled the first and second conditions to enable him to adduce further evidence.

[Application dismissed with costs to the plaintiff in any event.]

Cases referred to:

Yah binti Aji v. Fatimah binti Hj. Mohamed Ariffin [1969] 2 MLJ 186
Ladd v. Marshall [1954] 3 All ER 743
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70
Brown v. Dean [1910] AC 373
Hip Foong Hong v. H Neotia & Co. [1918] AC 888

Legislation referred to:
Social and Welfare Services Lotteries Board Act 1950-1962, s. 9(1)(b)

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Zainur Zakaria; M/s. Zainur & Maydien

JUDGMENT

Lim Beng Choon J:

This is an application for leave to adduce further evidence to meet the contention raised by the learned Counsel for the plaintiff that the sale of 2 bundles of the social welfare lottery tickets Exhibit D8A and D8B, by one Shanmugam s/o Muthani Chettiar, DW2, was illegal as the seller not an authorised seller pursuant to s. 9(1)(b) of the Social and Welfare Services Lotteries Board Act 1950-1962. The grounds of the application were that the issue of the legality pertaining to the sale and purchase of the said lottery tickets was raised only after the close of the defence and at the submission stage of the trial of this case thereby giving the first defendant no opportunity to introduce the authority cards granted to DW2 to refute the allegation of illegality and that the evidence which is sought to be introduced would have an important influence on the result of the case. Furthermore such evidence is said to be credible. Counsel for the plaintiff, quite naturally perhaps, opposed the application.

I can think of no statutory provisions which would empower this Court - both Counsel have not drawn my attention to any such statutory provisions - to permit fresh or further evidence to be let in after the close of a case and at the end of a trial pending judgment. However that may be, I agree, with respect, with the view taken by Chang Min Tat J (as he then was) in the case of *Yah binti Aji v. Fatimah binti Hj. Mohamed Ariffin* [1969] 2 MLJ 186 at p. 187. The relevant passage of the learned Judge appears at p. 187 of the reported case and I quote:

> After due consideration, I take the view that if under certain conditions, further evidence was allowed to be adduced on appeal, such evidence should under the same conditions be adducible at the hearing in the first instance, even though the side seeking to adduce such evidence had closed its case. An appeal is always by way of rehearing and if such evidence is let in at the appellate stage where the case is being reheard, I for one can see no justification for its exclusion when the case is being heard.

One legal principle which I must bear in mind is that an application of this nature will only be granted if and only if the three conditions advocated by Denning LJ (as he then was) in his judgment in *Ladd v. Marshall* [1954] 3 All ER 743 at p. 748 A-C where it is stated:

> The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

These three conditions were approved and applied by our then Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70.

The legal principle governing the adducing of fresh or additional evidence after the close of a case may well be firmly settled but the application of this principle to the facts and circumstances of each case is often a difficult task. It is therefore necessary to scrutinise the facts and circumstances of the present case with the utmost care.

It is worthy of notice that in the course of the cross-examination of the first defendant the learned Counsel for the plaintiff had asked him whether Shanmugam was an authorised seller of social welfare lottery tickets to which the first defendant replied that he did not know. He further admitted that if a seller is unauthorised agent (to sell ticket) it is an offence for anyone to buy a ticket from him. The question put to and the answer given by the first defendant would to my mind be sufficient to give an indication to the first defendant that the illegality pertaining to the sale and purchase of the lottery ticket in question might well be an issue. Yet the matter was allowed to pass by. The next important episode is of course the cross examination of DW2 when in the course of which he said that he had not been authorised in writing by the DG of Posts or the Chairman of the Social and Welfare Services Lotteries Board ("the Board") to sell the welfare lottery tickets. Just before he made the statement, he did however say that he was authorised only by a firm called Pantai Mas and another known as Nasib Baik to do so. His evidence is sufficient indication that something is not quite right and the matter shall be pursued further. Yet again nothing was done. The third episode occured when on the second day of the hearing this Court allowed DW2 to be recalled to testify regarding his encounter with Sivalingam when the latter has said to have made a self-incriminating statement to him. If DW2 could remember what Sivalingam said to him at a brief encounter which took place some 4 years ago it is somewhat amazing that DW2 could not remember at all about the written authority which had been granted to him by the Chairman of the Board. Bearing in mind that he had claimed to have been selling welfare lottery tickets for some 15 years and that he had the written authority to do so for some 2 years prior to 1985; it is incomprehensible that he could have failed to remember such an important matter. I have also taken into consideration the demeanour of DW2 and I am not at all satisfied that he could be easily shaken or be confused in the course of his giving evidence.

Quite apart from the earlier discussion, I am also satisfied that from the pleadings it should strike the first defendant that this issue of illegality might well be advanced. Steps should have been taken to find out whether Shanmugam was authorised to sell the tickets. Had this been done the defence could have easily produced the evidence which he now is trying to adduce. I have therefore no alternative but to hold that the first defendant has failed to satisfy the first condition.

The matter does not end here. The learned Counsel for the plaintiff has drawn the attention of this Court to the written authority purported to have been issued to DW2 (See Exhibit A attached to the supporting affidavit). Apparently DW2 was only authorised to sell the tickets in the State of Pahang. This has been conceded by Counsel for the defendant or if not conceded, he has not argued to the contrary with anything like his usual vigour. That being the case it is clear that the authority card issued to DW2 valid from the March 1985 to December 1985 cannot carry the matter any further; it is just as good or bad as if he had no authority. In the result the first defendant has also failed to satisfy this Court that condition (2) has been complied with - see *Brown v. Dean* [1910] AC 373 and in *Hip Foong Hong v. H. Neotia & Co.* [1918] AC 888.

For the above reasons the application is refused. Costs of the application shall be paid to the plaintiff in any event.

Also found at [1990] 1 CLJ 766